Considerations for an expert witness

RUSSELL G. THORNTON, ATTORNEY AT LAW
Cowles & Thompson, P.C.

When involved in a health care liability claim, a physician or other health care provider is a witness in 1 of 3 capacities. These capacities are 1) as a defendant to the proceedings, 2) as a treating physician of the patient at some point in time relevant to the proceedings, or 3) as an independent expert witness. Each of these roles is approached somewhat differently in the litigation process. The focus of this article is to provide the physician with some insight and some guidelines for consideration when acting as an independent expert witness in medical-related litigation in Texas.

DEFINING AN EXPERT WITNESS

Legally, the term *expert witness* is somewhat generic. It does not necessarily mean or imply that an individual is a leading or well-recognized authority in general medicine or in a particular area of specialty. It also does not mean, require, or imply that the health care provider has extensively published, or published at all, on the issues at hand. Under Texas law, an individual who has specialized training, education, and experience qualifies as an expert witness (1). In health care claims, testimony from such individuals, expert witnesses, is used to guide the court's or jury's determination on issues outside the common experiences of laypersons (2-4). In health care claims, experts are used to direct the jury on issues of whether the health care provider acted properly, whether the claimant was injured, and the cause of any such injuries.

Because of special training and experience, an individual who is a physician or some other type of health care provider, such as a nurse or respiratory therapist, is considered an expert witness under the *Texas Rules of Evidence* (1, 3, 5, 6). Thus, the physician who takes the stand as a defendant and offers testimony in the area of medicine is considered an expert witness. Likewise, when one of the patient's treating physicians offers testimony about the patient's medical condition and prognosis, that physician also is acting as an expert witness. What legal professionals refer to as an independent expert witness is an individual who has no prior connection with the case either as a party or as an individual involved in the patient's care. An independent expert is retained by counsel to address specific issues as to the appropriateness of the care and treatment rendered to the patient, as well as whether any of the patient's injuries could have been prevented or could have been a result of the medical care provided.

LEGAL LIMITS ON EXPERT TESTIMONY

Recently, medical and legal professionals have been concerned about the use of expert opinions that are not based on true scientific data, methods, or studies. This practice is often
referred to as "junk science." This concern was recently raised in connection with the silicone gel-filled breast implant litigation. Similar concerns also exist in connection with recent litigation involving the pharmaceuticals fen-phen (fenfluramine-phentermine) and Redux (dexfenfluramine). The US and Texas Supreme Courts have directed the trial courts, which handle the actual litigation of claims, to act as gatekeepers on expert testimony (7, 8). Thus, the trial court is to determine if someone is qualified to offer testimony as an expert. To qualify as an expert witness, an individual is required to show that his or her testimony is relevant to the case, is based on a reasonable foundation, and is reliable (8). Once the court determines that an individual is qualified to testify and can offer relevant testimony, the court is required to examine the scientific reliability of any nonepidemiologic methodology (8). Some factors that the court should consider in evaluating the reliability of scientific testimony include the following:

1. How much of the theory has been or can be tested?
2. How much does the technique rely upon the subjective interpretation of the expert?
3. Has the theory been subjected to peer review or publication?
4. What is the technique's potential rate of error?
5. What is the general validity of the underlying theory or technique as viewed by the relevant scientific community?
6. What nonjudicial uses have been made of the theory or technique?

The 1st, 3rd, 4th, and 5th factors indicate the use of scientific methodology for hypothesis testing. The 2nd and 6th factors are aimed at the expert's credibility, particularly whether the expert has formed opinions solely for the purposes of litigation. Thus, to be of assistance to counsel at trial, an expert's opinions must be reasonably based. Opinions and impressions generated specifically for litigation without community support are suspect (8).

PURPOSE OF EXPERTS

Ultimately, counsel retains expert witnesses to provide testimony at trials, to criticize or support the health care rendered to the patient, and to address whether damages to the patient could have been prevented or were caused by the health care provider's conduct. Legally, these last issues are referred to as negligence and proximate cause. Whether or not a health care provider is found liable for a patient's injuries requires that both of these elements be found to exist by the patient's expert witness and, if experts disagree, for a jury to believe the patient's expert witness' testimony. The terms negligence and proximate cause are defined under Texas law as follows:

*Negligence*, when used with respect to the conduct of a physician, means the failure to use ordinary care; that is, failing to do that which a physician of ordinary prudence would have done under the same or similar circumstances, or doing that which a physician of ordinary prudence would not have done under the same or similar circumstances.

*Ordinary care*, when used with respect to the conduct of a physician, means that degree of
care that a physician of ordinary prudence would use under the same or similar circumstances.

_Proximate cause_, when used with respect to the conduct of a physician, means that cause which, in a natural and continuous sequence, produces an event, without which such event would not have occurred. In order to be a proximate cause, the act or omission complained of must be such that a physician using ordinary care would have foreseen that the event, or a similar event, might reasonably result from it. There may be more than one proximate cause of an event (9).

These definitions are adjusted by specialty. Accordingly, _physician_ would be replaced with the specific specialty of the defendant, such as _surgeon_ or _internist_. Definitions are adjusted in this manner to ensure that each defendant is held to the proper standard of care. These are important definitions for an expert to consider when reviewing the conduct of a health care provider and determining whether that conduct was the cause of the patient's alleged injuries.

Before any deposition or trial testimony, an independent expert serves a number of functions extremely important to the evaluation and litigation of a claim. Most importantly, the expert provides an honest, candid, and thorough assessment of the health care provider's exposure to liability and the cause of the patient's alleged injuries. The independent expert also assists counsel in spotting issues or areas of medicine that are particularly important in determining the appropriate evaluation or diagnosis of the patient. Frequently, laboratory results, radiology results, and the patient's clinical course are particularly helpful in arguing whether the patient suffered a particular condition, disease, or complication from treatment.

Independent experts also serve as resources for reference information. In health care liability claims, counsel often want to review references that pertain to the evaluation, diagnosis, and treatment of the condition at issue. This information assists counsel in preparing for deposition and the actual trial of the case. Review of this information is particularly useful in providing counsel with information and ideas on which to base the examination of the opponent's expert witnesses at deposition or trial. Counsel can obtain this information independently, but the physician is more up-to-date on the medical issues and often can more readily point counsel to key publications relevant to the case.

**TESTIMONIAL FUNCTIONS**

The obvious important functions of an independent expert witness are to provide a report, to be deposed, and to appear at trial. Because health care liability claims frequently are complex, they often are the subject of specific pretrial orders from the court that set deadlines for when the parties' depositions should be taken, when experts should be designated with reports, and when experts should be deposed. In order to prepare for testimony, it is probably a good idea to ask counsel for this information when it becomes available. Thus, the witness can be aware of these deadlines and plan accordingly.

**Review and report**

Although a report does not need to be lengthy and exhaustive, it should reflect a well-thought-out, complete, and thorough overview summarizing the opinions the expert
intends to offer at trial. Additionally, it is important that the report clearly state whether the medical care at issue was within the appropriate standard of medical care and the reasons for this determination. Before creating a report, and certainly before signing an affidavit, it is important for the expert health care provider to thoroughly and carefully review the materials that are thought to be pertinent and necessary in order to render valid, accurate, and truthful opinions about the care provided and the patient's condition. An independent expert should ask to be provided with all of the records, sworn testimony, and pertinent studies, such as x-rays or computed tomography scans, that exist and are available. Although it may be quicker and easier to review excerpts or summaries made from medical records and depositions, this is dangerous and will adversely impact beneficial testimony or opinions that an expert may have to offer.

If a witness has not reviewed, or at least been provided with, all of the medical records and sworn testimony, it is easy for counsel to impeach his or her opinions and argue that the witness is not truly impartial or independent. Arguments can be made that the expert's opinions are not fair and reasonable because all of the information has not been reviewed and the expert has only considered one side of the story. In order to be beneficial and to offer credible testimony, the expert must have reviewed both sides of the dispute and formed an opinion based on that review of all the materials, as opposed to reviewing only excerpts of what counsel or only one side of the dispute may think is important. Even more problematic is that failure to review all of the pertinent information may cause an expert to erroneously criticize or support a health care provider's conduct.

A careful, thorough review of a case is needed. The small details are the areas where cases can be successfully prosecuted or defended. Any reviewer should go beyond reviewing merely the primary transcribed materials such as the admission and discharge summaries and operative reports. Notations and documentation by nurses and other health care providers often contain key supportive information or problematic information that needs to be considered and countered. Further, there may be errors or misstatements of fact in the records. These need to be unearthed and considered before testimony is offered. Failure to appreciate and consider these details can cause problems for the witness and the party being assisted at deposition or trial. The reviewer should also realize that any notes taken or references used in connection with his or her work on the case will be requested and reviewed by opposing counsel.

If any materials are missing or if additional information needs to be obtained or reviewed before a meaningful opinion can be rendered, clearly communicate that desire to counsel. Sometimes, important or helpful information is simply not available. Such requests, however, will ensure that the expert has received all the available information. It also ensures that there is no helpful information that might be available but was inadvertently omitted or not considered important when counsel initially forwarded the materials for review.

In reviewing a case, it is important for the independent expert witness to be realistic and to understand that substandard care has not been rendered just because a health care provider has chosen to do something in a different manner than the expert would have chosen. Although that is certainly important and should be conveyed to counsel, attention also needs to be paid to the definitions negligence and ordinary care, as discussed above. The safest course of action or "perfect" care is not the standard. Reduced to simple terms, the key
inquiry is whether the method chosen was reasonable and prudent under the circumstances.

It is important that independent expert witnesses be credible in their opinions and testimony. During the initial review and report activities and throughout the case, it is important that the experts only focus on and render opinions in areas where they are truly knowledgeable, active, and qualified to offer opinions. It is extremely easy for counsel to impeach and make expert witnesses look foolish when they attempt to offer opinions that are outside their areas of knowledge, expertise, and current practice. By overstepping their boundaries, experts only make it possible for juries to discount valid, well-based opinions they may have because of the appearance that they will say whatever is necessary to support their side.

**Deposition**

The deposition process is extremely important because it is the first opportunity the independent experts have to present their opinions to opposing counsel in a face-to-face setting. During the deposition process, they should expect to be tested on the basis and validity of these opinions. Further, counsel from both sides will pay particular attention to how these witnesses conduct themselves during the deposition, whether it appears that their opinions are credible, and whether they truly believe in the opinions they are offering. Probably more important than their education, training, and experience are the experts' demeanors and performances at deposition. The goals of all testimony, especially that of independent experts, are to make it believable and credible to a jury. Deposition is the only time before trial during which counsel are able to observe the experts in a pseudo-trial situation and make judgments about how they anticipate those individuals will present themselves at trial. Thus, performance and demeanor at deposition are important.

With those goals in mind, it is important that the experts take the deposition proceedings seriously and prepare thoroughly. Although it is an imposition on their time, it is important for the experts to meet with counsel before the deposition. This is an opportunity for them to obtain additional information on the focus of the case. This information may not necessarily appear in the records and depositions that they reviewed. Additionally, a deposition often is something that is anticipated with much stress, because it generally is not part of health care providers' day-to-day activities. A predeposition meeting with counsel can be of benefit in terms of providing information about opposing counsel's style and method of questioning and of potentially alleviating any concerns or questions. This meeting also gives experts and counsel an opportunity to address concerns that may exist about the positions taken by the parties in the litigation.

In preparing for a deposition, the expert should carefully review the records and depositions and know the case file as thoroughly as possible. By carefully reviewing and thoroughly knowing the case, more than likely the expert will feel more comfortable going into the deposition and will not misstate information during the deposition. Thorough and complete preparation often translates into confidence and a good demeanor and presentation at deposition. It also shows the opponents that they must confront a formidable witness and opinions in order to prevail at trial.

At the deposition itself, it is important that the witness display a demeanor of confidence, but not act in a nonresponsive, rude, hostile, arrogant, or condescending manner. This latter behavior shows counsel that the witness may not be well received by a jury. At times it may
be difficult for the witness to refrain from engaging in these negative behaviors, because some counsel may purposefully try to antagonize or intimidate that individual. Further, counsel may not be well prepared or versed on the medical aspects of the case. Despite these occurrences, it is important for the witness to remain in control, be responsive to the questions asked, be reasonable, and not be combative or argumentative. Remember that the function of the expert witness at deposition generally is to answer opposing counsel's questions. Although opposing counsel will probably ask broad questions initially to find out the opinions and impressions that the expert intends to offer at trial, this is not always the case. As a general rule, it is important to focus on the question asked and to answer that question.

**Trial**

The culmination of the work of independent experts occurs when the case goes to trial. Again, counsel understands that it is an imposition on their time, but it is extremely important for these witnesses to be available to counsel before their trial testimony. Particularly, counsel often like to meet with expert witnesses before trial, not only to discuss the parameters of their testimony, but also to obtain some additional information and insight for cross-examination of the opposition's experts. Additionally, in preparation for trial, counsel may desire some meetings with experts to discuss and finalize exhibits that might be useful in connection with their testimony at trial. These meetings frequently include not only a discussion of what the particular exhibits should show, but also a review of the final draft of any exhibits to be used. This is important because the exhibits likely will be used with the experts' testimony. Thus, the exhibits must accurately represent the opinions, conclusions, and testimony of the experts.

Experts also need to be available to counsel the night before they are expected to testify. This meeting can be particularly helpful, because the experts can obtain additional information as to the posture of the case, the trial positions of the parties, and the testimony to date. This interaction will help counsel prepare and will serve to make the testimony of the experts as effective as possible.

When independent experts take the stand at trial, it is important for them to be confident and stick to their opinions, but not be arrogant. Prior to this, however, they need to thoroughly review the case material again. The more intimate and sure-footed they are with the facts and issues of the case, the more credible and believable they will be to the jury. On the stand, they need to try to be relaxed but respectful of the importance of the proceedings. Their testimony should be clear, reasonable, and responsive. They also need to do their best to appear as an impartial observer while sticking to their opinions.

A common mistake that witnesses often make at trial or deposition is to argue over points they need to concede. For example, an expert witness often will be asked a hypothetical question, or to assume certain facts. Rather than simply answering the question, the witness will argue over the accuracy of the hypothetical question or be nonresponsive. This may occasionally be effective. It can, however, make the expert appear unreasonable. The better practice is simply to answer the question. That way the expert is more likely to be characterized as a truly impartial expert and not just as an advocate for one side or the other. Further, the counsel who retained the expert can clarify or put into proper context the
answers to any hypothetical questions posed by opposing counsel, if necessary.

**FINAL THOUGHTS**

Understandably, any involvement in the litigation process, even as an independent expert, is not something a person enjoys or anticipates with any desire. In order to provide the patient or the physician with a meaningful evaluation of a claim and to prosecute or defend a claim successfully, the services of independent experts are necessary to counsel. When counsel contacts a physician or other health care provider about review of a case, that individual needs to realize that behind the attorney is a patient or a physician who needs an accurate, honest review. Further, if a patient's or physician defendant's position can be supported, a credible individual is needed who is willing to support that position under oath. Despite any inconvenience or stress, consider that review of legal cases can provide insight into potential pitfalls and practices that result in legal claims. Thus, reviewers can gain valuable information for their own benefit and use from these reviews.

**References**